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Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly, in accordance with Commission on Human Rights resolution 2005/2 of 7 April 2005, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

The present report provides an update on recent activities of mercenaries and private military and security companies. As the latest events in Côte d'Ivoire and the Libyan Arab Jamahiriya have shown, mercenaries allegedly continue to be recruited and to be active. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination is especially concerned about the reported involvement of these mercenaries in serious human rights violations. During the reporting period, the Working Group has seen some encouraging policy and legislative developments concerning private military and security companies in several countries. There has also been some progress in efforts to prosecute the employees of such companies for human rights violations. Nonetheless, the Working Group remains concerned about the lack of transparency and accountability of these companies, and the absence of an international regulatory framework through which to monitor their activities.

This report also presents an overview of the activities carried out by the Working Group during the period under review, including a summary of the discussions that were held during the expert seminar on the State monopoly on the legitimate use of force (6 and 7 July 2011). Finally, the report takes stock of the activities and achievements under the mandate over the past six years, in particular the development of a draft convention on private military and security companies which is currently being considered by member States.

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I. Introduction

1. Pursuant to its mandate, the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination has continued to monitor mercenaries and mercenary-related activities in all their forms and manifestations, and to study the effects on the enjoyment of human rights of the activities of private companies offering military assistance, consultancy and security services on the international market. In accordance with Human Rights Council resolution 15/12 and General Assembly resolution 65/203, the Working Group submits the present report to the Assembly. The report covers the period following the presentation of the last report, issued on 25 August 2010.

2. The events during this period demonstrate that the issue of mercenaries remains vitally important. During the recent violence in the Libyan Arab Jamahiriya, mercenaries were reportedly used to attack civilian populations who were protesting on behalf of democratic rights. In Côte d'Ivoire, mercenaries were allegedly used by the Government to suppress the results of an election. In both countries, mercenary forces were reportedly involved in committing serious human rights violations.

3. Addressing the issue of private military and security companies also continues to be at the forefront of the efforts to protect human rights and to ensure that perpetrators of human rights violations are held accountable. During the period under review, some significant progress has been made towards the international regulation of private military and security companies, including consideration of regulatory options by the open-ended intergovernmental working group established by the Human Rights Council. There have also been some encouraging policy and legislative developments regarding private military and security companies at the national and regional levels and some progress in efforts to prosecute employees of such companies for human rights violations. Nonetheless, the Working Group on the use of mercenaries remains concerned about the lack of transparency and accountability of these companies and the absence of an international regulatory framework through which to monitor their activities.

4. This report examines these issues in more detail below. An introduction (sect. I) is followed by a discussion of recent activities of mercenaries and private military and security companies and reviews efforts to regulate private military and security companies at the international, regional and national levels (sect. II). Section III covers the Working Group's activities over the reporting period, while section IV provides a detailed discussion of the expert seminar on the State monopoly on the legitimate use of force. Section V reviews the achievements under the mandate since its establishment by the Commission on Human Rights in 2005. Since the mandate holders who were appointed at the inception of the Working Group in 2005 will have all left the Group by October 2011, this was thought to be an opportune time to provide the General Assembly with such an overview. The final section presents the conclusions and recommendations of the Working Group.

5. The following new members were appointed by the President of the Human Rights Council and assumed their functions on 1 August: Ms. Patricia Arias (Chile), Ms. Elżbieta Karska (Poland) and Mr. Anton Katz (South Africa). Besides welcoming the new members of the Working Group, the Council is also looking

forward to the appointment of a member from the Western group region, which it is expected will occur during the eighteenth session of the Council.

II. Update on recent activities of mercenaries and private military and security companies and the issue of accountability

A. Mercenaries

6. The recent increase in mercenary activities in Africa serves as a reminder that mercenaries are still active in that region and continue to pose serious threats to the enjoyment of human rights.

1. Use of mercenaries in Côte d'Ivoire

7. Presidential elections had been held in October and November 2010 in Côte d'Ivoire. After some uncertainty about the final result, Alassane Ouattara was declared the winner of those elections in early December 2010. However, the outgoing President, Laurent Gbagbo, refused to concede defeat until he was arrested on 11 April 2011. For several months, he allegedly recruited Liberian mercenaries to consolidate his power base and attack the supporters of the President Elect. There were some reports that pro-Ouattara supporters had also recruited Liberian mercenaries.[1] About 4,500 Liberian mercenaries were reportedly active in Côte d'Ivoire, mainly in the western part of the country, along the border with Liberia.[2]

8. Since the election, there have been numerous allegations that Liberian mercenaries were involved in serious human rights violations, including summary executions, enforced disappearances, rape, torture, cruel, inhuman or degrading treatment, arbitrary arrests and detentions, arson, pillaging and looting.[3] Some mercenaries were reportedly arrested upon their return to Liberia.[4] It is unclear, however, whether any mercenaries have been brought to justice in either Liberia or Côte d'Ivoire.

9. The Working Group has taken the following actions in response to the situation in Côte d'Ivoire. On 19 January 2011, it sent allegation letters to both Côte d'Ivoire and Liberia requesting further information on mercenary activities in Côte d'Ivoire, and on measures taken to prevent such activities and to hold those mercenaries involved in human rights violations accountable. To date, it has not received a response to its letters.[5]

10. On 28 January 2011, the Working Group requested a visit to Côte d'Ivoire. In this regard, the Human Rights Council acknowledged the standing invitation issued by President Ouattara to all special procedures mandate holders, including the

[1] See A/HRC/17/48, para. 31.

[2] Ibid.

[3] See A/HRC/17/49.

[4] See, for instance, http://www.guardian.co.uk/world/2011/jun/15/ivory-coast-liberia-mercenary-bob-marley-arrested/print.

[5] See the joint communications report of special procedures (A/HRC/18/51).

Working Group on the use of mercenaries, to conduct visits to the country.[6] The Working Group is hoping to have conducted such a visit by the end of 2011.

11. On 1 April 2011, the Working Group issued a press release, jointly with several other special procedures mandate holders, in which it expressed concern about the involvement of English-speaking mercenaries in attacks against civilians and recalled that the recruitment of such mercenaries is prohibited under international law.[7]

12. The Working Group notes that there is increasing concern regarding mercenary activities in West Africa generally and growing interest in developing a regional approach to this problem. In May 2011, President Ouattara called for such a regional approach, noting that many Liberian mercenaries who were active in Côte d'Ivoire had returned to Liberia, from where they may move on to Sierra Leone and then Guinea.[8] The Secretary-General has also favoured the development of a subregional strategy for addressing the mercenary problem.[9] On 20 June 2011, the Economic Community of West African States (ECOWAS) called upon its member States to monitor movements across their borders, with a view to arresting perpetrators of crime and preventing mercenary activities.[10]

2. Use of mercenaries in the Libyan Arab Jamahiriya

13. Peaceful demonstrations by Libyan citizens seeking political change in the Libyan Arab Jamahiriya began in February 2011. Within a few weeks, there were allegations that foreign mercenaries were being used by the Libyan authorities to violently suppress political protests. The Working Group has noted that this alleged use of mercenaries by the Government of the Libyan Arab Jamahiriya departs from the traditional practices witnessed in the twentieth century and set out in the International Convention on the Recruitment, Use, Financing and Training of Mercenaries,[11] adopted by the General Assembly in 1989. Traditionally, mercenaries have been recruited to either participate in an armed conflict or overthrow a Government. The March 2004 attempted coup in Equatorial Guinea offers an example of the traditional use of mercenaries. In the Libyan Arab Jamahiriya, on the other hand, mercenaries were not used to overthrow the Government: allegedly, they were used by the Government to quell civilian protests. Such mercenaries had allegedly been recruited from neighbouring African countries and, possibly, also from Eastern Europe.[12]

14. In relation to allegations concerning the use of mercenaries, the International Commission of Inquiry established in March 2011 by the Human Rights Council to investigate alleged violations of international human rights law in the Libyan Arab Jamahiriya has concluded that foreign nationals have taken part in the conflict,

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[6] See Human Rights Council resolution 16/25 of 25 March 2011, para. 9.

[7] Office of the United Nations High Commissioner for Human Rights; "Côte d'Ivoire: UN rights experts call on all parties to spare civilians and stop human rights violations". Available from http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10908&LangID=E.

[8] See http://www.bbc.co.uk/news/world-africa-13500677?print=true.

[9] See S/2011/387, para. 49.

[10] See http://news.ecowas.int/presseshow.php?nb=104&lang=en&annee=2011.

[11] United Nations, *Treaty Series*, vol. 2163, No. 37789.

[12] See A/HRC/17/44, para. 194.

including perpetrating human rights violations, particularly on the side of Government forces.

15. However, the Commission of Inquiry noted, and the Working Group agrees with its assessment, that there is some uncertainty about whether these foreign nationals meet the international definition of mercenary. Further information is required as to how, when and for what purpose these troops were recruited. For example, the Working Group does not know whether the foreign nationals were resident in the Libyan Arab Jamahiriya prior to their recruitment by the Government, whether they were engaged as part of an existing foreign military exchange, and when exactly they were recruited and for what purpose (for example, to suppress the demonstrations or to take part in the subsequent armed conflict).[13] What is clear, however, is that where mercenaries have been involved in human rights violations against the civilian population, they must be held accountable.[14]

16. In response to the events unfolding in the Libyan Arab Jamahiriya, the Working Group issued a press release on 22 February 2011, jointly with several other special procedures mandate holders, in which it expressed grave concern about the alleged involvement of foreign "mercenaries" in the killing of protesters.[15]

17. On 23 February 2011, the Working Group also sent an urgent appeal to the Government of the Libyan Arab Jamahiriya, jointly with several other special procedures mandate holders, in which it expressed concern about the death of civilians and the excessive use of force against protesters by security forces in the context of peaceful demonstrations. The Working Group requested, inter alia, detailed information on measures taken to ensure that foreign armed individuals were held accountable for any possible human rights violations. No response has been received to date.[16]

18. The Human Rights Council held a special session on the situation in the Libyan Arab Jamahiriya on 25 February 2011. The joint statement of special procedures mandate holders was delivered by the Chair-Rapporteur of the Working Group on the use of mercenaries.[17] In the statement, the mandate holders expressed concern about the authorities' enlistment of "mercenaries" from other countries to support the crackdown on demonstrators in Benghazi and other cities.

19. On 26 February 2011, the Security Council, in paragraph 4 of its resolution 1970 (2011), decided unanimously to refer the situation in the Libyan Arab Jamahiriya to the Prosecutor of the International Criminal Court. Pre-Trial Chamber I of the International Criminal Court concluded that there are reasonable grounds for believing that three Libyan officials are criminally responsible for indirectly committing crimes against humanity (murder and persecution). Arrest warrants were issued on 27 June 2011. The Office of the Prosecutor has reportedly gathered direct evidence on the role of Saif al-Islam, son of Moammar Qadhafi, in recruiting mercenaries.[18]

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[13] See A/HRC/17/44, para. 201.

[14] Ibid.

[15] "Libya: stop the massacre — UN experts". Available from http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10747&LangID=E.

[16] See the joint communications report (A/HRC/18/51).

[17] See http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10761&LangID=E.

[18] See A/HRC/17/45, para. 17.

20. On 17 March 2011, the Security Council, in paragraph 16 of its resolution 1973 (2011), deplored the continuing flows of mercenaries into the Libyan Arab Jamahiriya and called upon all Member States to prevent the provision of armed mercenary personnel to the Libyan Arab Jamahiriya.

21. Considering the ongoing armed conflict occurring in the Libyan Arab Jamahiriya, the Working Group is not in a position to conduct a visit to that country. Nonetheless, it will make a request to the Libyan authorities for the conduct of such a visit early in 2012 or as soon as the hostilities have ceased and there is freedom of movement within the country.

B. Private military and security companies

1. Recent developments at the international level

22. Building on the Montreux Document[19] — which sets out applicable international legal obligations and good practices for States in regard to the operations of private military and security companies during armed conflict — the private military and security industry, with the support of the Government of Switzerland, developed the International Code of Conduct for Private Security Service Providers, which was launched in Geneva in November 2010. The Code establishes a common set of principles for private military and security companies which commits signatory companies to provide security services in accordance with the rule of law, respect for human rights and the interests of their clients.

23. The Working Group welcomes these efforts to clarify good practices and formalize and improve industry self-regulation as a means of protecting human rights, and is looking forward to examining the mechanisms currently being developed for implementing the Code. While the Working Group does not believe that such efforts are sufficient to ensure the accountability of those companies for human rights violations or that they will provide victims with an effective remedy, it nonetheless envisages that these initiatives will effectively complement a binding international legal instrument, such as the draft convention proposed by the Working Group (A/HRC/15/25, annex, and see also A/65/325).

24. Following the Working Group's presentation of the draft convention to the Human Rights Council in September 2010, and pursuant to the Working Group's recommendations, the Council established an open-ended intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries (Council resolution 15/26, para. 4); and requested the open-ended intergovernmental Working Group to present its recommendations at the twenty-first session of the Council (para. 6).

25. Representatives from 70 member States (as well as the African Union and the European Union) participated in the first session of the open-ended intergovernmental Working Group, which was held from 23 to 27 May 2011. The

[19] A/63/467-S/2008/636, annex.

United Nations Children's Fund (UNICEF) and the World Health Organization (WHO) participated in the session as well. Several non-governmental organizations in consultative status with the Economic and Social Council took part in the debates. Members of the Working Group on the use of mercenaries participated as resource persons (see below). The Working Group on the use of mercenaries was encouraged by the fact that a majority of the participants agreed on the need for regulation of private military and security companies. Discussions in the intergovernmental Working Group will continue next year.

2. National policy and legislative developments and regional initiatives

26. South Africa has adopted legislation on the regulation of private military and security companies, although the legislation has not yet entered into force. The Regulation of Foreign Military Assistance Act of 1998 will be replaced by the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, which was adopted by Parliament in 2006. During its visit to South Africa in November 2010, the Working Group was informed that the regulations necessary for the entry into force of the new Act were in the process of being approved and would be enacted shortly.[20]

27. Iraq is considering the adoption of legislation on the regulation of private military and security companies. During its visit to Iraq in June 2011, the Working Group was informed that the draft legislation proposed by the Government will be considered by the Council of Representatives, possibly by the end of the current legislative session.[21]

28. In August 2010, the President of Afghanistan, Hamid Karzai, had issued a decree ordering all private military and security companies to leave the country within the next four months.[22] In March 2011, he announced that such companies would be allowed to remain in the country for another year in order to provide security for development projects. At the end of that period, the Afghan Public Protection Force is slated to provide protection for such projects.[23]

29. While some States have adopted or are considering the adoption of national legislation on private military and security companies, others have favoured self-regulation by the industry instead. During the reporting period, the Government of the United Kingdom of Great Britain and Northern Ireland confirmed in Parliament in March 2011 that it is seeking to establish a code of conduct setting out national standards derived from the International Code of Conduct for Private Security Service Providers, and to monitor and audit compliance of private military and security companies based in the United Kingdom. However, the Government does not consider it necessary to pass legislation to regulate private military and security companies.

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[20] See A/HRC/18/32/Add.3, para. 59.

[21] See A/HRC/18/32/Add.4, para. 47.

[22] See *Small Arms Survey 2011* (Geneva, 2011), chap. 4, p. 101. See also "Karzai orders guard firms to disband", *New York Times*, 17 August 2010. Available from http://www.nytimes.com/2010/08/18/world/asia/18afghan.html.

[23] See "Afghanistan lets Blackwater stay despite shakeup of security contractors", *Guardian* (guardian.co.uk), 7 March 2011. Available from http://www.guardian.co.uk/world/2011/mar/07/afghanistan-blackwater-xe-security-contractors.

30. During the reporting period, there have also been some developments in the United States of America aimed at clarifying the scope of United States jurisdiction over private contractors operating overseas. As noted by the Working Group during its mission to the United States in 2009, there is still uncertainty as to whether the Military Extraterritorial Jurisdiction Act covers non-Department of Defense contractors.[24] This is an important gap: in Iraq, it was mainly Department of State contractors, such as Blackwater, which were most often accused of committing crimes.[25] In 2010, there were renewed attempts to introduce, in the United States Congress, the Civilian Extraterritorial Jurisdiction Act with a view to filling the gaps in the existing legislation, but these efforts were unsuccessful. The main contentious issue centred on the insistence of the Department of Justice on a statutory carve-out for the authorized intelligence activities of the United States Government.[26] So that adoption could be secured, a proposal was reintroduced on 23 June 2011 with such a statutory carve-out.[27]

31. On 11 May 2011, the European Parliament adopted Resolution 2010/2299(INI) on the development of the common security and defence policy after the entry into force of the Treaty of Lisbon.[28] In the Resolution, the European Parliament called for the adoption of European Union regulatory measures, including a comprehensive system for the establishment, registration, licensing and monitoring of private military and security companies and for the reporting on violations of applicable law by such companies; and urged the European Commission and the Council of Ministers to begin the process of enacting a directive to harmonize national measures regulating the services offered by private military and security companies, and to draft a code of conduct that would pave the way for a decision on regulating the export of security services to third States.[29]

3. Judicial developments

32. Where the employees of private military and security companies are involved in human rights violations, it is the responsibility of the territorial State to prosecute those responsible for such violations. Where such prosecutions are not possible, as it was the case in Iraq because of the immunity arrangement put in place between 2004 and 2009 (see below), the home State has the responsibility for prosecuting. The Working Group remains concerned about the lack of prosecutions of employees of private military and security companies who have been involved in human rights violations. Nevertheless, the Working Group is encouraged by the successful efforts of the United States Government to reinstate the case against four Blackwater employees for their involvement in the shooting of Iraqi civilians in Nissour Square, Baghdad, on 16 September 2007. On 31 December 2009, the trial court dismissed the indictment against these defendants on the grounds that the evidence against them had been tainted by the "compelled" statements given by the defendants. Ruling on the appeal of the Department of Justice, the appellate court found that the evidence was not wholesale tainted and sent the case back to the trial court for the

[24] See A/HRC/15/25/Add.3, para. 59.

[25] See A/HRC/18/32/Add.4, paras. 50-52.

[26] See http://judiciary.senate.gov/pdf/11-5-25%20Breuer%20Testimony.pdf.

[27] See http://www.gpo.gov/fdsys/pkg/BILLS-112s1145rs/pdf/BILLS-112s1145rs.pdf.

[28] Reference: INI 2010/2299; text adopted: P7_TA(2011)0228; source reference: T7-0228/2011.

[29] See also the recommendations emanating from the PRIV-WAR project at http://priv-war.eu/?page_id=261.

determination, as to each defendant, of what evidence, if any, would be admissible.[30]

33. A number of civil suits have been lodged by victims against private military and security companies in United States courts as a means of obtaining redress for human rights violations committed overseas. These claims are generally brought under the Alien Tort Statute. One of these claims had been lodged in 2004 by some 250 Iraqi civilians allegedly tortured by CACI and Titan (now L-3 Communications) at the Abu Ghraib prison. After the case (*Saleh* v. *Titan*) was dismissed on appeal in 2009, the lawyers for the plaintiffs filed a petition with the Supreme Court asking that it review the case. In October 2010, the Supreme Court asked the United States Solicitor General to file a brief expressing the views of the United States. The brief, which was filed in May 2011, argued that the case should not be heard by the Supreme Court.[31] The Supreme Court announced on 27 June 2011 that it would not hear the appeal, thereby ending this case.[32]

III. Activities of the Working Group over the reporting period

34. In accordance with its usual practice, the Working Group held three regular sessions during the reporting period, two in Geneva and one in New York. The Working Group held its eleventh session from 29 November to 3 December 2010 and its twelfth session from 4 to 8 April 2011 in Geneva, and its thirteenth session from 5 to 8 July 2011 in New York. The Working Group continued to receive and review reports regarding the activities of mercenaries and private military and security companies and their impact on human rights and decided on appropriate action. As noted above, in May 2011, the members of the Working Group participated as resource persons in the first session of the open-ended intergovernmental Working Group established by the Human Rights Council.

A. Country visits

35. During the period under review, the Working Group visited South Africa in November 2010 and Iraq in June 2011. The full reports and recommendations are contained in addenda to document A/HRC/18/32.

36. The Working Group visited South Africa from 10 to 19 November 2010 to discuss the efforts of the Government to combat mercenary activities and ensure effective regulation and oversight of private military and security companies operating in South Africa and South African personnel working for private military and security companies abroad. The Working Group found that, owing to challenges in implementation and a resulting lack of prosecutions, the 1998 legislation on the provision of "foreign military assistance" had not had a significant impact on the private military and security industry. The Working Group noted that the Government had adopted new legislation in 2006 to address some of the gaps in the 1998 legislation. However, as the new legislation is not yet in force, its effectiveness

[30] See http://www.courtlistener.com/cadc/26ZB/united-states-v-paul-slough/.

[31] See http://www.ccrjustice.org/files/09-1313%20Titan%20US%20Br%20(2).pdf.

[32] See http://ccrjustice.org/files/Saleh_NewsReleaseJun2711.pdf.

in regulating the provision of security services in areas of armed conflict cannot be assessed at this time.

37. The Working Group urged the Government of South Africa to take measures to coordinate legislative frameworks regulating domestic private security companies and private military and security companies operating abroad so as to ensure the establishment of a comprehensive and effective monitoring regime. Furthermore, the Working Group recommended that the authorities consider the establishment of accountability mechanisms for private military and security companies at the domestic level. Mechanisms should also be put in place to ensure that victims have access to effective remedies for human rights violations involving such companies.

38. The Working Group undertook a visit to Iraq from 12 to 16 June 2011. The Working Group focused its visit on the measures taken by the Government to regulate the activities of private military and security companies operating in the country and the impact of those activities on the enjoyment of human rights. The Working Group found that, despite a decrease in incidents involving such companies in recent years, due in part to stricter regulation of their activities by the Iraqi authorities and efforts by the United States to better oversee its in-country contractors, Iraq continues to grapple with the problem of impunity for contractors involved in human rights violations between 2003 and 2009. In addition, while the 2009 Status of Forces Agreement between Iraq and the United States removed immunity for private security contractors working with the Department of Defense, the Working Group found that the removal of this immunity clearly does not cover all contractors employed by the United States Government in Iraq.

39. The lack of successful prosecution in the home countries of contractors accused of human rights violations in previous years points to a continued absence of accountability for private military and security companies. As the case against the alleged perpetrators of the shooting in Nissour Square is still pending in the United States courts, and as other perpetrators have not been brought to court, the Working Group has been of the view that victims of human rights violations involving contractors and their families are still waiting for justice.

40. The Working Group recommended that the Government of Iraq, as a matter of priority, adopt legislation on private military and security companies, which has been under consideration since 2008. It also recommended that the Government of Iraq devote the necessary resources to regulating these companies and monitoring their activities so as to ensure that they respect the human rights of the Iraqi people.

B. Communications

41. During the period under review, based on information that it had received, the Working Group sent communications to Afghanistan, Colombia, Côte d'Ivoire, Honduras, Israel, Liberia, the Libyan Arab Jamahiriya, the United Kingdom and the United States. The Working Group would like to thank the Governments of Bolivia (Plurinational State of), Colombia, the United Kingdom and the United States for their replies to its communications. The Working Group reiterates its interest in receiving responses from the concerned Governments in regard to allegations submitted and considers the responses to its communications to be an important component of the cooperation of Governments with respect to its mandate.

C. Participation in the open-ended intergovernmental Working Group on the regulation of private military and security companies

42. From 23 to 27 May 2011, the members of the Working Group on the use of mercenaries participated as resource persons in the first session of the open-ended intergovernmental Working Group on the regulation of private military and security companies established by the Human Rights Council. The Working Group on the use of mercenaries submitted a contribution to the intergovernmental Working Group in advance of the session.[33] During the session, individual members of the Working Group on the use of mercenaries made presentations regarding the activities of private military and security companies, including the human rights impact of these activities, national legislation and practices, obstacles to accountability, the need for an effective remedy for victims, and the elements of an international regulatory framework.

43. The Working Group on the use of mercenaries was encouraged by the broad and active participation of States and intergovernmental and non-governmental organizations in the session of the open-ended intergovernmental Working Group; and looks forward to further discussions at the next session of the intergovernmental Working Group, which will be held in early 2012. In this regard, the Working Group on the use of mercenaries encourages all States and other stakeholders to study carefully the draft convention that it submitted to the Human Rights Council and to continue to participate actively in the work of the intergovernmental Working Group, with a view to supporting the drafting of an international instrument for the regulation of private military and security companies.[34]

IV. Expert seminar on the State monopoly on the legitimate use of force

44. During the thirteenth session, held in New York, the Working Group hosted an expert seminar, on 6 and 7 July 2011, on the State monopoly on the legitimate use of force. The Working Group is most grateful to the 10 experts from around the world who contributed their knowledge and time to this endeavour (see annex).

45. In opening the seminar, the Chair-Rapporteur of the Working Group explained that the objective of the seminar was to discuss the content and status of the State monopoly on the legitimate use of force and the possible implications for the regulation of private military and security companies. The topics discussed during the seminar included the State monopoly on the use of force, national regulation of private military and security companies, and the possibility of adopting specific regulatory standards for different types of activities.

[33] http://www2.ohchr.org/english/bodies/hrcouncil/military_security_companies/docs/A_HRC_WG.10_1_CRP.1.E.doc.

[34] See http://www2.ohchr.org/english/bodies/hrcouncil/military_security_companies/statements_presentations.htm.

A. The State monopoly on the legitimate use of force

46. In the discussions, one expert noted that the State monopoly on the legitimate use of force was closely linked to the emergence of the modern State in Europe. Another expert explained that over the last several centuries, many States had held a monopoly on the use of force, but continued to use mercenaries. In fact, States continued to use mercenaries except during a period of about 100 years between the 1860s and the 1960s. Another expert underscored the fact that the monopoly on the legitimate use of force was a central attribute of sovereignty. As the State's monopoly on the use of force evolved, it was accompanied by entrenched ideas about the appropriate and legitimate use of force and democratic controls; and in this regard, it was proposed that a State could, in a manner consistent with human rights standards, delegate certain functions involving the use of force to private actors.

47. One expert stated that the use of private force has very different implications in States with a "firm" monopoly on the use of force and States where the monopoly on the use of force is less firm. In the latter type of State, such as Afghanistan, using private force can be extremely problematic, both because the territorial State may not be able to effectively regulate private security actors and because the activities of such actors could hinder the State's own efforts to establish control over the use of force. The role of the privatization of security in undermining the monopoly of the State on the legitimate use of force was also discussed in relation to Africa.

B. National regulation of private military and security companies

48. The experts pointed out that there is currently no comprehensive or standard regulatory framework for the activities of private military and security companies. Nonetheless, States bear the responsibility for holding private military and security companies accountable for human rights violations and should therefore develop national rules for regulating private military and security companies and for ensuring accountability.

49. Specifically, it was agreed that there should be stronger parliamentary control over the security activities delegated to private actors. Several experts believed national licensing systems should be set up in order to ensure that the personnel of private military and security companies comply with certain professional requirements, that they are aware of the relevant provisions of international human rights and humanitarian law, and that the companies have clear policies for their operations and the use of force, along with internal mechanisms for the investigation of any alleged violations committed by their personnel. Finally, some expressed the view that States should ensure that private military and security companies are held criminally responsible for their employees' conduct and should establish compensation mechanisms for victims. These steps would contribute to combating the culture of impunity that currently prevails.

50. There was agreement that national legislation is necessary, but also an awareness that, to the extent that private military and security companies can easily move their operations from one country to another, isolated attempts at adopting national legislation can have only a limited impact. One expert also discussed relevant rules of international humanitarian law. The experts agreed on the

importance of reaching international consensus on the need to regulate the private military and security industry. They considered that the draft convention developed by the Working Group on the use of mercenaries provided a comprehensive framework for international and national regulation of private military and security companies and that it should be supplemented by national legislation.

C. The issue of adopting specific regulatory standards for different types of activities

51. Several experts suggested that the diversity of functions performed by private military and security companies may warrant an approach to regulation based on specific activities or contracts that pose a heightened risk to human rights. In this connection, one expert noted that contract law is increasingly utilized to control and influence the behaviour and the activities of private military and security companies. Another expert suggested a regulatory structure in which national legislation would provide a clear list of activities that private military and security companies could be allowed to carry out, as well as specify the types of weapons that those companies could use. One expert expressed the view that licensing systems should not grant blanket authorization to companies to provide any or all services. Rather, a licensing system should consider whether a company and its employees have the training and capacity to perform particular activities in compliance with human rights standards.

D. Implications for the Working Group's activities and possible further steps

52. According to most of the experts, the existence of a State monopoly on the use of force does not preclude States from delegating certain functions involving the use of force to private actors. Nevertheless, such delegation should be carried out only in compliance with international human rights law and international humanitarian law, and under strict conditions which should be spelled out in national legislation. In view of the discussions, the Working Group believes that it would be useful to undertake a comprehensive review of national laws in order to identify good practices regarding the regulation of private military and security companies, and areas that may require more attention or regulation or both.

53. The expert seminar also highlighted the rapidly changing face of the private military and security industry. In this regard, the Working Group believes that further investigation is necessary into the nature of these changes and into the particular challenges posed by the evolution of the industry. Most of the experts also felt that an international regulatory framework for private military and security companies is necessary and welcomed the proposal of the Working Group for a draft convention regulating the activities of those companies.

54. The Working Group looks forward to continuing interaction with experts coming from different regions and having a range of perspectives, for the purpose of exploring and analysing future relevant issues.

V. Achievements under the mandate

55. All of the mandate holders who were appointed at the inception of the Working Group in 2005 will have completed the exercise of their mandates by October 2011. This being the case, the present section reviews their activities undertaken since the establishment of the Working Group in 2005 to analyse and address the human rights impact of the activities of mercenaries and private military and security companies. In carrying out its mandate, the Working Group has undertaken country visits, sent communications to and received communications from Governments, organized regional consultations with member States and elaborated a draft convention on private military and security companies.

A. Country visits

56. Since its establishment, the Working Group has conducted 11 country visits aimed at examining the activities of mercenaries and private military and security companies, their impact on human rights and the measures adopted by Governments to address such impact. During these visits, the Working Group engaged in constructive dialogue with Governments, civil society, private military and security companies, and other relevant stakeholders.

57. The Working Group had the opportunity to examine the situations in countries where mercenary activities have been reported (Equatorial Guinea), countries where private military and security companies are established (United Kingdom and United States), countries where those companies recruit (Chile, Ecuador, Fiji, Honduras, Peru and South Africa) and countries where they operate (Afghanistan and Iraq). The Working Group wishes to express its sincere gratitude to these Governments for having extended invitations and for their cooperation during these country missions.

58. In order to follow up on the implementation of its recommendations, the Working Group held meetings with the Permanent Missions to the United Nations of Afghanistan, Ecuador, Fiji, Honduras, Peru and the United States.

59. A number of requests for country visits have not received a favourable response. The Working Group encourages Governments to accept its requests to conduct country visits.

B. Communications

60. Based on information received, over the past six years, the Working Group has sent 35 allegation letters to 24 Governments[35] and 3 urgent appeals to 2 Governments.[36] The Working Group has also sent reminder letters and follow-up letters on several occasions. Communications addressed many of the issues concerning the activities of mercenaries and private military and security

[35] Afghanistan, Australia, Bolivia (Plurinational State of), Chile, Colombia, Côte d'Ivoire, Croatia, Cuba, Ecuador, Equatorial Guinea, Fiji, Hungary, Iraq, Ireland, Israel, Liberia, the Libyan Arab Jamahiriya, Mexico, Papua New Guinea, Peru, Romania, South Africa, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

[36] Guinea and Honduras.

companies, including serious human rights violations, the recruitment and training of third-country nationals, and national policies and practices such as licensing and registration procedures. It is the practice of the Working Group to send reminder letters to Governments that do not reply, or reply only partially, to its communications. Nonetheless, 10 Governments have failed to respond to any of the Working Group's communications.[37] The Working Group expresses its appreciation to those Governments that have provided substantive replies to its communications and invites those that have not done so to cooperate with its mandate.

C. Regional consultations

61. Pursuant to the request contained in General Assembly resolution 62/145, the Working Group has held regional consultations on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, in particular regarding the effects of the activities of private military and security companies on the enjoyment of human rights. Pursuant also to Human Rights Council resolution 10/11 of 26 March 2009, the Working Group held regional consultations in all five regions between 2007 and 2009.[38]

62. Participants in the regional consultations noted that the emergence of several new challenges and trends concerning the activities of mercenaries and private military and security companies increasingly impeded the enjoyment and exercise of human rights. They discussed the expansion of private military and security companies' operations in each region and the use of private security guards in lieu of national police forces. During the meetings, participants shared information regarding the potential repercussions on national sovereignty of outsourcing traditional government functions to private companies and discussed the regulations and other measures that States had adopted to ensure that private military and security companies respected international human rights standards. The Working Group and participants discussed general guidelines, norms and basic principles for the regulation and oversight of the activities of private military and security companies and the Working Group's work towards elaborating a possible new binding international legal instrument on the regulation of private military and security companies for the purpose of encouraging the further protection of human rights.

D. Elaborating a draft convention on private military and security companies

63. In its resolution 2005/2, the Commission on Human Rights requested the Working Group to prepare draft international basic principles that encouraged

[37] Afghanistan, Côte d'Ivoire, Equatorial Guinea, Fiji, Guinea, Liberia, the Libyan Arab Jamahiriya, Mexico, Papua New Guinea and Peru.

[38] The regional consultation for Latin America and the Caribbean was held in Panama in December 2007. It was followed by the consultation for Eastern Europe and Central Asia held in Moscow in October 2008; the consultation for Asia and the Pacific held in Bangkok in October 2009; the consultation for Africa held in Addis Ababa in March 2010; and the consultation for the Western European and other States group held in Geneva in April 2010.

private companies offering military assistance and consultancy and security services on the international market to respect human rights in their activities (para. 12 (e)). The Human Rights Council reiterated this request in its resolution 7/21 (para. 2 (e)). In its resolution 10/11 of 26 March 2009, the Council requested the Working Group to consult with intergovernmental and non-governmental organizations, academic institutions and experts on the content and scope of a possible draft convention on those companies; to share with member States, elements for a possible draft convention on private military and security companies; and to request their input on the content and scope of such a convention (para. 13 (a) and (b)).

64. Pursuant to these requests, the Working Group held extensive consultations with Governments, academics and non-governmental organizations with a view to elaborating the text of a possible new draft convention designed to regulate the activities of private military and security companies. In January 2010, the Working Group transmitted a note on the elements for a possible draft convention on private military and security companies to all member States for comment. At the conclusion of a broad and inclusive consultative process, the Working Group presented a draft text of a possible convention on private military and security companies to the Human Rights Council at its fifteenth session (A/HRC/15/25, annex). As mentioned above, the text of the draft convention is now with the intergovernmental Working Group established by the Human Rights Council, for consideration by member States.

VI. Conclusions and recommendations

A. Mercenaries

65. **As recent events in Côte d'Ivoire and the Libyan Arab Jamahiriya have shown, mercenaries continue to be recruited and active in several parts of the world. Mercenary activities often constitute threats to national and even regional peace and security. They also have a serious impact on the right of peoples to self-determination and the enjoyment of human rights. The Working Group is deeply concerned regarding the alleged involvement of mercenaries in serious human rights violations, including summary executions, enforced disappearances, rape, torture, cruel, inhuman or degrading treatment, arbitrary arrests and detention, arson, pillaging and looting.**

66. **The Working Group:**

- **Urges States to identify, arrest and prosecute promptly the mercenaries responsible for such violations and to take the necessary measures to prevent the recruitment and training of mercenaries on their territory**
- **Further appeals to member States that are not yet parties to consider acceding promptly and as a matter of urgency to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries**

B. Private military and security companies

67. During its country visits, sessions and expert meetings, the Working Group engaged in consultations with a broad range of stakeholders in order to exchange views regarding the impact on human rights of private military and security companies and approaches to effective regulation of their activities. It remains concerned about the increasing use of such companies around the world and the lack of accountability for human rights violations in connection with their activities. The Working Group found that insufficient attention is paid to the problems raised by the activities of private military and security companies and that further research is needed on the impact on human rights of their activities and on effective regulatory strategies.

68. The Working Group welcomes efforts to clarify obligations under international law and identify good practices, such as the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, and industry self-regulation initiatives such as the International Code of Conduct for Private Security Service Providers. The Working Group, nonetheless, considers that a comprehensive legally binding international regulatory instrument is necessary to ensure adequate protection of human rights.

69. The Working Group:

- Encourages all member States to study carefully the proposed text of a possible draft convention as well as the essential elements for a possible international framework to regulate and monitor the activities of private military and security companies and to continue to participate actively and constructively in the work of the intergovernmental Working Group established by the Human Rights Council, with a view to establishing in the shortest possible time a suitable binding framework through which to regulate and monitor the activities of private military and security companies

- Recommends, as a matter of priority, that member States adopt national legislation designed to regulate the activities of private military and security companies and ensure its effective implementation. Such legislation should, at a minimum, require licensing, registration, vetting, human rights training, Government oversight and regular monitoring, and should provide for civil and criminal responsibility in the event of human rights violations

- Also recommends that member States that contract with private military and security companies ensure prompt investigation into and prosecution of violations of international human rights law involving private military and security companies so as to guarantee accountability for human rights violations and provide an effective remedy for victims

70. Finally, the members of the Working Group on the use of mercenaries, especially those appointed at its inception in 2005 who are ending the exercise of their mandate in 2011, would like to take this opportunity to thank all States, intergovernmental and non-governmental organizations, academics and

individuals, and other stakeholders, that have cooperated with the Working Group over the last six years. They express the hope that such cooperation will continue in the coming years. In particular, they wish to recommend that all States continue to cooperate with the Working Group in the fulfilment of its mandate by, inter alia, extending invitations to the Working Group to visit and accepting the Working Group's requests to conduct country visits. Finally, the Working Group recommends that States consider carefully the allegation letters and urgent appeals sent by the Working Group and endeavour to respond promptly, accurately and in detail.

Annex

Speakers at the expert seminar on the State monopoly on the legitimate use of force (New York, 6 and 7 July 2011)

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